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Nos. 82-327, 82-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHICAGO BOARD OPTIONS EXCHANGE INCORPORATED, *et al.*,
Petitioners,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Respondent.

BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (SEVENTH CIRCUIT NOS. 81-1660, 81-2587)

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QUESTION PRESENTED

Whether the correct judgment of the court of appeals must be vacated solely because the case became moot as a practical matter as a result of legislative and regulatory actions prior to final briefing on the petitions for writs of certiorari.

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BOARD OF TRADE OF THE CITY OF CHICAGO,
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BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

On September 11, 1975, the Board of Trade of the City of Chicago ("Board of Trade")[1] was designated by the Commodity Futures Trading Commission ("CFTC") as a contract market for futures contracts on Government National Mortgage Association mortgage-backed pass-through certificates ("GNMA's"). On April 17, 1980, the Chicago Board Options Exchange, Inc.

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[1] Pursuant to Rule 28.1 of the Rules of this Court, the Board of Trade states that it has no parent company, subsidiaries (other than wholly-owned subsidiaries), or affiliates.

("CBOE"), a registered national securities exchange, filed proposed rule changes with the Securities and Exchange Commission ("SEC") to accommodate the creation of a market in exchange-formed off-set options on GNMA's. The Options Clearing Corporation, Inc. ("OCC") filed rule changes on February 20, 1981, to provide for the issuance and clearance of the proposed options. The SEC approved the proposed rule changes of CBOE and OCC on February 26, 1981, and August 6, 1981, respectively. The Board of Trade, which had commented on both proposed rule changes, filed petitions for review of the SEC orders approving the CBOE and OCC rule changes in the United States Court of Appeals for the Seventh Circuit on April 24, 1981 (7th Cir. No. 81-1660), and October 5, 1981 (7th Cir. No. 81-2587), respectively.[2] In each petition, the Board of Trade contended that the SEC orders had to be set aside because the CFTC had exclusive jurisdiction over GNMA options trading and the SEC had no substantive authority under its statutes to authorize such trading.

The court below rendered judgment in both cases on March 24, 1982, with the majority finding for the Board of Trade and setting aside the SEC orders. At the beginning of its opinion in No. 81-1660, the court recognized that GNMA's are both securities under section 3(a)(10) of the Securities and Exchange Act of 1934 ("SEA"), 15 U.S.C. § 78c(a)(10), and commodities under section 2(a)(1) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 2 (1976)—a contention not disputed by any of the parties.

The court then focused on the terms of and congressional intent behind the CEA. It determined that the

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[2] The Board of Trade brought a third petition on January 21, 1982, challenging the SEC's approval of options trading on Treasury bonds, bills, and notes at CBOE and the American Stock Exchange (7th Cir. No. 82-1097). The Board of Trade has filed a motion to dismiss the petition.

express terms of section 4c(b)[3] and 4c(c),[4] 7 U.S.C. § 6c(b), (c) (1976 & Supp. II 1978), banned any trading of off-set commodity options, including GNMA options, unless traded pursuant to rules promulgated by the CFTC. The court went on to hold, however, that due to the so-called "SEC savings clause," the ban on options trading would not affect the SEC unless GNMA options fell within the CFTC's exclusive jurisdiction. Following a careful analysis of the statutory language and legislative history, the appeals court concluded that GNMA options were within the CFTC's exclusive jurisdiction. Therefore, any SEC jurisdiction was precluded, and the SEC's order also was expressly prohibited by the options ban sections of the CEA. As a final matter respecting the CFTC's power over GNMA options, the court of appeals held that the "Treasury amendment" did not divest the CFTC of exclusive jurisdiction over options on GNMA's.

As an alternate holding, the court found that apart from the prohibitions in the CEA the SEC had no authority under the securities laws as they stood at the time of its decision to authorize and regulate options on exempted securities such as GNMA's. The court held that exchange-formed off-set options were not securities under the terms of section 3(a)(10) of the SEA, 15 U.S.C. § 78c(a)(10). While SEA § 9(b), 15 U.S.C. § 78i(b), grants the SEC authority to regulate options, section 9(f), 15 U.S.C. § 78i(f), specifically withdrew

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[3] Section 4c(b) authorises options trading "involving any commodity regulated under this chapter" except certain specified agricultural commodities ("old" commodities), subject to CFTC promulgation of regulations.

[4] Section 4c(c), also known as the "options ban," dictates that "no person" may enter into "any commodity option transaction involving" any of the "new" commodities—including GNMA's—until the CFTC submits appropriate rule proposals to the Congress thirty days prior to their effective date.

that authority with respect to options on GNMA's. The court determined that no other provision of the securities laws granted the SEC substantive power over GNMA options.

In deciding No. 81-2587, the court found that no significant differences existed between the jurisdictional issues presented by the SEC's order approving the CBOE rule changes and the order approving the OCC rule changes, and accordingly set aside the latter order for the same reasons enunciated in its opinion in No. 81-1660.

The court denied petitions for rehearing and suggestions for rehearing *en banc* on May 27, 1982. No member of the court of appeals, not even dissenting Judge Cudahy, requested a rehearing *en banc*. CBOE and OCC petitioned this Court for a writ of certiorari on August 25, 1982, and the Solicitor General submitted a petition on behalf of the SEC on September 24, 1982.

While Nos. 81-1660 and 81-2587 were pending before the court of appeals, the CFTC and SEC reached an agreement on the jurisdictional issues at stake in these cases (the "Accord"), and submitted proposed implementing legislation to Congress which would codify the terms of the Accord by transferring jurisdiction over options on commodities/exempted securities (*e.g.*, GNMA's) from the CFTC to the SEC.[5] The legislative package was composed of amendments to both the CEA, contained in the Futures Trading Act of 1982 (H.R. 5447, 97th Cong., 2d Sess. (1982)) ("CEA Amendments"), and the securities laws, contained in the Securities Acts Amendments (H.R. 6156, 97th Cong., 2d Sess. (1982)) ("Securities Amendments"). Title I of the CEA Amendments would

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[5] The lower court held that the Accord in and of itself did not moot the issues in Nos. 81-1660 and 81-2587 because the CFTC and SEC could not alter their statutorily mandated jurisdictions, and that Congressional action was necessary to implement the Accord.

overrule the appeals court's first ground of decision,[6] and the Securities Amendments would alter the court's second ground.[7] The Securities Amendments were enacted on October 13, 1982. Slightly different versions of the CEA Amendments were passed by the House and Senate on September 23 and October 1, respectively,[8] and the two bills are scheduled to go to conference committee early in the post-election session of Congress beginning November 29.

On October 14, 1982, the SEC approved rule changes of CBOE, the American Stock Exchange, Inc. ("Amex"), and OCC which would permit the trading of exchange-formed off-set options on GNMA's and Treasury instruments. Securities Exchange Act Release No. 19125, 47

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[6] The CEA Amendments of relevance here would modify the exclusive jurisdiction granted in CEA § 2(a)(1) (redesignated 2(a)(1)(A)) with the proviso "except to the extent otherwise provided in subparagraph (B) of this paragraph." Subparagraph (B) states that "Notwithstanding any other provision of law—(i) This Act shall not apply to . . . any transaction whereby any party acquires any put, call or other option on one or more securities . . . ." *See* Title I, H.R. 5447, 97th Cong., 2d Sess. (1982) (House version). The Senate version of H.R. 5447 does not differ with respect to these provisions. *See* 128 Cong. Rec. S13104 (daily ed. October 1, 1982). The legislation thus explicitly amends the exclusive jurisdiction clause to remove the CEA's previous preemption of SEC authority regarding options on securities.

[7] The Securities Amendments redefine security in Section 3(a)(10) of the SEA to include "any put, call, straddle, option or privilege on any security . . . or entered into on a national securities exchange relating to foreign currency." In addition, SEA § 9(f) is amended to eliminate the previous withholding of SEC authority over options on exempt securities. A new § 9(g) is added, stating: "Notwithstanding any other provision of law, the [SEC] shall have the authority to regulate the trading of any options on a security . . . ." Conforming amendments to the other securities laws are also made.

[8] *See* 128 Cong. Rec. H7472-7523 (daily ed. September 23, 1982); 128 Cong. Rec. S13064-13114 (daily ed. October 1, 1982). *See also* note 6 *supra*.

Fed. Reg. 46,934 (1982). In response thereto, the Board of Trade filed a petition with the Seventh Circuit Court of Appeals, No. 82-2659, challenging the orders approving the rule changes. The Board of Trade requested an emergency stay of the SEC's orders, in light of the announced intention of CBOE and Amex to begin trading in the newly authorized options on October 22, 1982. The court refused to issue the temporary stay,[9] on the ground that "H.R. 6156 [the newly enacted Securities Amendments] grants the Securities and Exchange Commission jurisdiction under the securities laws to authorize options on government securities." *Board of Trade v. SEC*, No. 82-2659 (7th Cir. Oct. 21, 1982) (order denying motion for reconsideration *en banc*). Trading in options on Treasury instruments on CBOE and Amex has begun as scheduled.

Previously, on October 15, 1982, the Solicitor General filed a Memorandum Suggesting Mootness, and CBOE and OCC have filed a memorandum to the same effect. This brief represents the respondent Board of Trade's response to the petitions and the memoranda.

REASONS FOR DENYING THE WRIT

I. BECAUSE THE PETITIONERS HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE, THE COURT OF APPEALS' JUDGMENT SHOULD STAND EVEN THOUGH THE CASE IS NOW MOOT AS A PRACTICAL MATTER.

The Board of Trade recognizes that this case has been mooted as a practical matter. Enactment of the Securities Amendments has codified SEC authority over options—and in such a manner that, as recently as Octo-

[9] The Board of Trade's motion for an emergency stay was denied by an order dated October 21, 1982. The same day, the Board of Trade filed an emergency motion for reconsideration *en banc* of the stay motion, and the court of appeals, acting *en banc*, denied the motion for the reason stated above.

ber 21, the court of appeals declined to stay the opening of options markets similar to the market at issue in this case.[10] In addition, the SEC has issued new orders which permit the trading of GNMA options on CBOE. These orders, issued pursuant to the authority newly granted by the Securities Amendments, supersede the orders that were at issue in Nos. 81-1660 and 81-2587. Finally, trading in options on financial instruments has begun on the CBOE under the new SEC orders.

The petitioners now argue that certiorari should be granted in order for the Court to vacate the judgment of the court below because of the developments outlined above. The Board of Trade disagrees and respectfully urges the Court to deny the petitions.

In support of their request, petitioners rely on *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979), and *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). However, these cases do not require the Court to vacate the judgment of the court of appeals. Rather, both cases hold only that a *court of appeals* is required to vacate the judgment of a *district court* when the decision of the district court becomes moot pending appellate review. Although there is dictum in *Munsingwear* to the effect that the Supreme Court also "normally" [11] vacates a lower court's judgment when the case becomes moot awaiting decision, nowhere does the opinion state that this Court is required to vacate the judgment of a court of appeals, and indeed it admits of exceptions to the so-called "normal" practice. 340 U.S. at 40 n.42.

Contrary to petitioners' argument, *Munsingwear* and its progeny indicate that the appellate court's decision in

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[10] It should also be noted that the amendments also have resolved many of the concerns raised by petitioners in their arguments for a grant of certiorari—that the lower court's opinion endangered the existing stock options exchanges and created regulatory gaps.

[11] *City of Mesquite v. Aladdin's Castle, Inc.*, No. 80-1577, 50 U.S.L.W. 4210, 4211 n.9 (1982).

the instant case should stand. *Munsingwear* makes plain that a court of appeals must vacate the district court's judgment for mootness only because prior to conclusion of the initial appeal, the parties have not had a full and fair chance to litigate within the statutory scheme:

> [Vacating the district court's opinion] clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When the procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary. . . . [In summary, the vacation procedure] is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences.

340 U.S. at 40.

Here, the petitioners have been given all the review provided for by the relevant "statutory scheme" [15] and indeed all the review required by a full and fair opportunity to litigate.[16] Thus, prior to becoming moot, the

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[15] Section 25(a)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a)(1), provides for review of SEC orders in a court of appeals. Nothing in the securities laws, however, provides for mandatory review by this Court, nor could petitioners expect such review as of right.

[16] Certiorari review is not a necessary element of a full and fair opportunity to litigate because it is fundamentally different from the statutory right to be heard by a court of appeals. *See* Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 Mich. L. Rev. 946, 953-58 (1980). "A review on writ of certiorari is not a matter of right, but of judicial discretion," Supreme Court Rule 17; a writ of certiorari is reserved for "passing upon constitutional and other important questions of law for the public benefit." *Hearings Before the Comm. on the Judiciary of the House of Representatives on H.R. 10479*, 67th Cong., 2d Sess. 2 (1922) (remarks of Chief Justice Taft), *quoted in Dick v. New York Life Ins. Co.*, 359 U.S. 437, 452 (1959) (Frankfurter, J., dissenting). Certiorari review is not meant to correct the peculiar injustices that

dispute was fairly and finally resolved according to the statutory scheme for review of SEC orders. This Court should not mechanically undo that resolution. Moreover, the mootness here did not occur by "happenstance" but rather through deliberate legislative and subsequent regulatory actions prompted by the petitioners themselves. Petitioners cannot be heard to argue now that their own actions in proposing and promoting legislation to moot the controversy require this Court to vacate the judgment of the court of appeals.[14]

Finally, because the Board of Trade does not intend to pursue the related cases filed in the Seventh Circuit, and because the statutory language relied on by the court of appeals has been changed, the opinion below cannot "spawn any [untoward] legal consequences." Concern about res judicata effects is unwarranted because the same dispute between the Board of Trade and the petitioners cannot recur under the new statutes. Collateral estoppel effects are of doubtful importance because no issues determined by the court of appeals are likely to affect either the Board of Trade or the petitioners.[15] By

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may have been suffered by particular litigants but rather "to develop uniform national rules of law that meet the needs of a changing society." Note, *supra*, 78 Mich. L. Rev. at 955. Furthermore, this case may be distinguished from cases that become moot after certiorari has been granted. Where certiorari already has been granted, the Court has indicated its desire to reopen the issue and the petitioner may have an expectancy of the further opportunity to litigate. Where a case becomes moot before certiorari is granted, however, the Court has not yet addressed the dispute, and the petitioner has no expectancy of further litigation. Therefore, by its appearance before the court of appeals below, the SEC has had a full and fair opportunity to litigate which is unaffected by pre-certiorari mootness of the controversy.

[14] *Compare City of Mesquite v. Aladdin's Castle, Inc.*, 50 U.S.L.W. at 4211 (deliberate legislative attempt to moot controversy held ineffective).

[15] Because the court of appeals stayed the SEC orders under review pending its decision, there was never any trading of the

denying certiorari, the Court does not stamp its approval on the court's opinion. In the unlikely event that the decision below is relied upon in some subsequent, live controversy, this Court then will have the opportunity to review its correctness.[16] Therefore, the concerns expressed in *Munsingwear* are not present here, and its reasons for vacating a lower court's judgment are inapplicable.

The Court previously has permitted exceptions to the *Munsingwear* procedure, as it did *sub silentio* in *Velsicol Chemical Corporation v. United States*, 435 U.S. 942 (1978) and *Local 102, International Ladies' Garment Workers' Union v. United States*, 439 U.S. 1070 (1979). Each case was mooted after review by the court of appeals but prior to a decision on the petition for certiorari,[17] and in each case the Solicitor General argued that it would be unfair to vacate the lower court opinion because the petitioning party had received a full and fair opportunity to litigate the dispute prior to mootness.[18] The Court in both cases denied certiorari without stating

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GNMA options, and thus there is no possibility now of private lawsuits against the CBOE or OCC based on what would have been illegal trading.

[16] *See Alabama v. Davis*, 446 U.S. 903, 904 (1980) (Stevens, J., dissenting).

[17] In *Velsicol*, a lawyer was ordered to testify before and produce documents to a grand jury regarding matters he asserted were protected by the attorney-client privilege. The district court nevertheless ordered the lawyer to testify and the court of appeals affirmed. The lawyer then decided to seek a writ of certiorari, but because his motions for a stay of the court of appeals' mandate were denied, he was forced to testify and produce the required documents before filing his petition for certiorari.

The facts in *International Ladies'* are in pertinent respects the same.

[18] *See* Brief For the United States in Opposition at 4-8, *Velsicol Chem. Corp. v. United States*, 435 U.S. 942 (1978); Memorandum For the United States in Opposition at 4 n.4, *Local 102, Int'l Ladies' Garment Workers' Union v. United States*, 439 U.S. 1070 (1979).

its reasons, leaving the lower court opinions intact. Because of the similarity in situation, the same procedure should be followed here.[19]

If this Court were to routinely vacate decisions intentionally mooted by subsequent legislation, courts of appeals would have less incentive to be as thorough in deciding cases where new legislation is imminent and parties would have less incentive to vigorously pursue their appeals. As a result, both the judicial system and the legislative process would be subject to manipulation—to the detriment of an already overloaded court system.

II. THE DECISION OF THE COURT OF APPEALS WAS CORRECT UNDER THE THEN EXISTING STATUTES.

Even though the case now appears to be moot as a result of legislative and regulatory actions occurring after the parties had a full and fair opportunity to litigate, the court of appeals correctly interpreted the securities and commodities laws as they stood at the time of decision.[20] Thus, the Court should not vacate the decision but should simply deny certiorari.

In vacating the orders of the SEC in Nos. 81-1660 and 81-2587, the court of appeals correctly concluded that the CFTC had exclusive jurisdiction over the trading of GNMA options. GNMA's are commodities for the purposes of section 2(a)(1) of the CEA, 7 U.S.C. § 2 (1976), because futures contracts on GNMA's are traded through the facilities of the respondent Board of Trade, as they have been since 1975. GNMA's also are exempted

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[19] *See also Dove v. United States*, 423 U.S. 325 (1976) (petition for certiorari dismissed but lower court judgment not vacated when petitioner died).

[20] The bulk of petitioners' arguments regarding the appellate court's interpretation of the securities laws is now irrelevant in view of the Securities Amendments, and such arguments provide no basis for certiorari.

securities under Section 3(a)(12) of the SEA, 15 U.S.C. § 78c(a)(12), (1976), and the SEC traditionally has not exercised significant regulatory authority over them.[21]

The CEA explicitly bans options on commodities—without limitation as to whether the commodity is also a security—unless traded pursuant to the regulations of the CFTC,[22] and grants the CFTC exclusive authority over options "involving" futures contracts.[23] The CEA thus explicitly provides a comprehensive scheme for the regulation of both futures and options on the same underlying instrument. By contrast, the only provision of the SEA that dealt explicitly with options expressly withheld

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[21] As exempted securities, GNMA's are not subject to the registration requirements of the SEA. Moreover, the formation of and over-the-counter trading in GNMA's are primarily regulated by the Department of Housing and Urban Development, the Treasury Department, and the Federal Reserve Board, with the SEC's role limited to antifraud enforcement. *See Report of the Joint Treasury-SEC-Federal Reserve Study of the Government-Related Securities Markets*, Senate Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 2d Sess. 1, 105-06, 176-78 (Comm. Print 1980); Letter to the Hon. Patrick J. Leahy, Senate Subcomm. on Agricultural Research and Legislation, from Robert Carswell, Deputy Secretary of the Treasury (April 13, 1978), *reprinted in* S. Rep. No. 850, 95th Cong., 2d Sess. 49 (1978) *reprinted in* 1978 U.S. Code Cong. & Ad. News 2087, 2137.

[22] CEA § 4c(b), (c), 7 U.S.C. § 6c(b), (c) (1976 & Supp. II 1978).

[23] CEA § 2(a)(1), 7 U.S.C. § 2 (1976). The CFTC has plenary authority to regulate options under section 4c(a) and 4c(b) of the CEA. Section 4c(a) prohibits transactions in the commodities specifically enumerated in section 2(a)(1) which may be used for hedging or price discovery and which are "of the character of" options. Section 4c(b) prohibits "any transaction subject to the provisions of paragraph (a) of this section" that involves a commodity not specifically enumerated in section 2(a)(1) and that is an option. Thus, section 4c(b) incorporates the key functions for which the commodity could be used (hedging and price discovery) as defining the commodity option transaction subject to section 4c(b).

from the SEC authority to regulate options on exempted securities.[24]

Faced with these statutory schemes, the majority of the court below correctly assessed that Congress intended the CFTC to regulate options on exempted securities where a futures contract on the underlying instrument was already regulated by the CFTC.[25] In addition to the clarity of language on the face of the statutes, the evidence from the legislative history overwhelmingly supports the court's interpretation of congressional intent.

For example, Congress itself said that section 4c of the CEA applied to options on "new" commodities such as GNMA's.[26] In 1974 and again in 1978, Congress drew

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[24] *See* SEA § 9(b), (f), 15 U.S.C. § 78i(b), (f) (1976).

[25] The court relied on this Court's analysis in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979), which held that an instrument (there, a pension plan) will not be deemed a "security" in the face of an alternative regulatory framework.

[26] *See, e.g.*, S. Rep. No. 850, 95th Cong., 2d Sess. 22, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2110:

> The action Congress took in 1974 reflects the congressional awareness that futures markets would not remain static . . . . Specifically, Congress was aware in 1974 that proposals for futures trading in financial instruments and Government securities were being developed.
>
> The wisdom of these decisions is evident in rapid development and acceptance of futures markets in both GNMA mortgage-backed securities and United States Treasury bills.
>
> These are not commodities in the traditional sense. However, the need and utility of futures markets in these commodities to hedge against inflation and market uncertainty, as well as aid in market arbitrage, is evident.

Accord, id. at 13-14, 1978 U.S. Code Cong. & Ad. News at 2101-02; H.R. Rep. No. 1181, 95th Cong., 2d Sess. 12 (1978).

In 1978, in addition to reauthorizing the CFTC, Congress enacted the ban on commodity options contained in CEA § 4c(c), 7 U.S.C. § 6c(c) (Supp. II 1978). The evidence from 1978 of congressional intent concerning the regulation of options on financial instruments is thus directly relevant to the interpretation of the CEA.

the line between CFTC and SEC jurisdiction through the so-called "SEC savings clause" by preserving SEC jurisdiction over instruments traditionally regulated by the SEC, *i.e.*, *corporate* securities and options thereon.[27] The SEC twice sought and failed to obtain from Congress an express exemption for "securities" from the definition of "commodities."[28] This legislative background thus rebuts petitioners' contention that there was an implied exemption from CFTC regulation for options on all securities that are commodities.[29]

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[27] For example, Representative Poage, Chairman of the House Committee on Agriculture stated: "[The CEA] was not intended, however, to apply to trading in interests and rights traditionally known as securities, including, for example, stocks, *corporate* bonds, warrants, and debentures, nor was it intended to apply to trading in options to purchase any of the foregoing." 120 Cong. Rec. 34737 (1974) (emphasis added).

Again, in 1978, the Senate Report noted the essential differences between registered and exempted scurities, stating:

> Put and call options to sell or purchase *individual exchange-traded industrial equities* are now traded on securities exchanges. Regulation of these options is under the jurisdiction of the SEC, which regulates the exchanges on which these options are traded and *oversees a comprehensive system of disclosure by the issuers of the underlying industrial equities.*

S. Rep. No. 850, 95th Cong., 2d Sess. 21-22 (1978) (emphasis added), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2087, 2109-10. It was thus recognized that SEC regulatory jurisdiction over options derived from the regulatory authority over the underlying industrial equities.

[28] *Board of Trade v. SEC*, Appendix at A-25, A-26.

[29] The report of the House Agriculture Committee accompanying the Securities Amendments—which were designed to alter the lower court's decision—affirmed that the court reached the correct conclusion but that more pragmatic considerations warrant a change in the jurisdictional structure:

> [The Seventh Circuit's] conclusion is consistent with the policy expressed by Congress in the past in providing CFTC with regulatory authority over hedging and price-discovery instruments

Although the petitioners criticize the court for its conclusion that options "involve" future contracts on the same underlying instrument within the meaning of CEA § 2(a)(1), the SEC itself in testimony to Congress in 1978 emphasized the interdependence of options and futures and recognized the necessity for uniform regulation of them.[30] In rejecting the SEC's legislative initiative in 1978 to transfer regulatory authority over futures and options on "securities" that are also commodities, the Congress reaffirmed the CFTC's authority to regulate these contracts.[31]

The so-called "Treasury amendment," offered by the Treasury to exempt bank and other financial institutions' transactions in the "cash" market in various instruments, originally included "puts and calls on securities" as one of the items over which CFTC jurisdiction

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and the SEC with the burden of protecting the efficiency and fairness of the capital formation market.

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While the Committee continues to believe that this functional breakdown serves important public purposes, it recognizes the pragmatic consideration that the public will be best served by ending the jurisdictional dispute between the two agencies and supporting the enactment of [sic] law of the jurisdictional accord reached voluntarily by the CFTC and the SEC.

H.R. Rep. No. 626, Part 2, 97th Cong., 2d Sess. 2 (1982).

[30] *See Board of Trade v. SEC*, Appendix at A-30 n.28, A-31 n.29 (quoting testimony of SEC Chairman Williams).

[31] Moreover, Congress recognized that commodities trading, whether by options or futures, provides hedging and risk-shifting functions whereas securities trading involves the capital formation process, and that different types of regulation were required for each. Thus, the 1974 House Report stated that "the concepts of margin . . ., the actual delivery of commodities in certain limited situations . . ., *and the handling of devices such as options are, and should remain, entirely different within the respective spheres of regulation.*" H.R. Rep. No. 975, 93d Cong., 2d Sess. 71 (1974) (emphasis added). *See also* note 27 *supra*.

was withheld. In limiting the scope of the exemption to cash market transactions by financial transactions, "puts and calls" were deleted.[32]

Thus, aside from the clarity of the statutory scheme itself, the evidence is overwhelming that Congress intended in 1974 and 1978 for the CFTC—and not the SEC—to exercise jurisdiction over off-set options on exempted securities that were also commodities.[33]

The court's conclusion that the 1974 and 1978 amendments to the CEA granted the CFTC authority to regulate off-set options on exempt securities is the major holding of the case. As an alternate holding, the court

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[32] *See Board of Trade v. SEC*, Appendix at A-35. Moreover, the Senate Committee, which added the Treasury Amendment, emphasized its limited scope: "[T]he Committee amendment provides that *interbank trading* of foreign currencies and specified financial instruments is not subject to CFTC regulation." S. Rep. No. 1131, 93d Cong., 2d Sess. 6 (1974) (emphasis added), *reprinted in* 1974 U.S. Code Cong. & Ad. News at 5848. The congressional focus in adopting the Treasury amendment was to avoid subjecting "transactions . . . between banks and other sophisticated institutional participants" to the CEA; regulation by the CFTC was "unnecessary," because these transactions were already "regulated by the bank regulatory agencies." *Id.* at 23, 26, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 5864, 5866. *See CFTC v. American Board of Trade*, 473 F. Supp. 1177 (S.D.N.Y. 1979) (holding that Treasury amendment does not preclude CFTC regulation of options on foreign currency); *CFTC v. Sterling Capital Co.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,169 (N.D.Ga. 1981) (same).

[33] One of the arguments made by CBOE and OCC in their petition for certiorari is that the SEA is a "better" regulatory scheme than the CEA and that the SEC is a better regulator than the CFTC. Such arguments, of course, have no bearing on the legal question of statutory interpretation as was presented in this case. *See Board of Trade v. SEC*, Appendix at A-50, A-64-A-65. In addition, it should be noted that the CEA has important protections not contained in the SEA—such as reparations procedures and civil penalty authority—and that the CFTC won praise from Congress in 1978 for its handling of the futures markets in GNMA's and other exempted securities. *See* note 26 *supra*.

determined that under the SEA the SEC had no authority in the first instance to regulate such options. This holding was buttressed both by the terms of the statute itself and by the SEC's own actions.[84]

The only express grant of substantive SEC power over options at the time of decision was contained in section 9(b), and section 9(f) withheld this grant with respect to options on *exempted* securities—like GNMA's. Moreover, as found by the court of appeals, the SEC had consistently relied on section 9(b) for its regulatory authority over stock options.[86] For example, when the SEC first authorized the CBOE stock options market in 1973, it relied only on Section 3(a)(11) in addition to 9(b).[86] Section 3(a)(11) does permit the SEC certain freedoms in defining the term "equity security," a power withheld in section 3(a)(10) with respect to the term "security." But GNMA's were not equity securities,[87] and therefore under the SEC's own interpretation of its power, it had none to authorize trading of GNMA options.

Thus, the SEC itself had evidenced through its actions the interpretation that its regulatory power over options derived from its regulatory power over the underlying instrument. Indeed, Congress in 1978 explicitly confirmed this analysis while reaffirming CFTC exclusive jurisdiction and enacting CEA § 4c(c).[88] When the court

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[84] And, again, the possibly adverse effects of this holding catalogued in the petitions for certiorari are of no possible concern now that the Securities Amendments are law. Thus, the primary reasons petitioners have advanced for granting certiorari no longer appertain.

[86] *See Board of Trade v. SEC*, Appendix at A-47.

[86] *See* SEA Release No. 9930 (1973), [1972-1973] Fed. Sec. L. Rep. (CCH) ¶ 70,171 (rule 9b-1); SEC Rule 3a11-1, 17 C.F.R. § 240.3a11-1 (1981) (defining an option on an equity security as an equity security).

[87] *Board of Trade v. SEC*, Appendix at A-45 n.45.

[88] *See* note 27 *supra*.

acted, the SEC had no regulatory authority over GNMA's and therefore had no regulatory authority over GNMA options.

Section 3(a)(10)—the primary SEA definition of "security"—provided the final confirmation that the SEC had no regulatory authority over options without reference to the underlying instrument. Although Congress in 1934 was well aware of options—witness section 9(b)—it chose not to include "options" by name within the many terms used in the section. "Moreover, the other terms included in the section did not encompass exchange-formed off-set options. Petitioners' reliance on the phrase "instrument commonly known as a security" is unavailing because it has been interpreted to have the same meaning as the phrase "investment contract" [39] and because the introductory phrase to the section—"unless the context otherwise requires"—provides a significant limitation. Since Congress chose not to include options in section 3(a)(10) but rather granted the SEC authority through a separate section, § 9(b), and since Congress also enacted a separate, comprehensive regulatory scheme governing options on exempted securities such as GNMA's in the CEA, the "context" clearly required that the otherwise unbounded reach of "instrument commonly held to be a "security" be held not to include GNMA options.

The lower court thus correctly decided the issues before it. The legislative history incontrovertibly demonstrates that Congress in 1974 and 1978 intended futures and options on the same underlying instrument to be regulated by a single agency, the CFTC. Moreover, as evidenced by the SEA and related SEC actions, SEC authority over options was based on regulatory authority over the underlying instrument, and it thus had no authority in its own right over GNMA options.

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[39] *See Board of Trade v. SEC*, Appendix at A-43, *quoting United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975).

CONCLUSION

The Court of Appeals correctly decided the narrow question of statutory construction posed by this case. For the reasons stated above, the respondent Board of Trade respectfully requests the Court to deny the petitions for writ of certiorari.

Respectfully submitted,

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